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**ABORIGINAL PEOPLE:
HISTORY OF DISCRIMINATORY LAWS**


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November 1987
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ABSTRACT

This paper surveys the history of federal and provincial laws discriminating against aboriginal people. While the primary focus is on Indians and the federal Indian Act, federal and provincial homestead and franchise laws are also examined. The first section, dealing with encroachments on civil and political rights, reviews the history of federal and provincial denial of the right to vote; federal interference with indigenous systems of self-government; federal and provincial restrictions on Indian property rights; federal restrictions on the sale of agricultural products; and special legal disabilities in the area of wills and estates. The second section reviews federal policy on Indian status and the resulting impact on cultural rights as recognized in the International Covenant on Civil and Political Rights. The section examines special aspects of the criminal law that have applied to Indian people, from extensive restrictions on the possession of liquor to the prohibition of land claims suits and certain cultural practices.



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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
CIVIL AND POLITICAL RIGHTS	3
A. The Federal and Provincial Franchise	3
B. Self-Government	10
C. Property Rights	14
1. The Right to Homestead	14
2. Restricted Right to Sell Agricultural Products	16
3. Wills and Estates	17
FEDERAL CONTROL OF INDIAN STATUS AND MINORITY RIGHTS IN INTERNATIONAL LAW	20
CRIMINAL LAW	22
A. Liquor Offences	22
B. Other Criminal Offences	26
CONCLUSION	27





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ABORIGINAL PEOPLE:
HISTORY OF DISCRIMINATORY LAWS*

INTRODUCTION

This paper will outline the history of federal and provincial laws applicable to aboriginal people.

Much has been written about discriminatory federal legislation respecting Indians. The exclusive jurisdiction of Parliament over "Indians and lands reserved for the Indians"⁽¹⁾ and the large body of resulting federal legislation⁽²⁾ are obvious reasons for the emphasis on the federal side of this story. There has been relatively little discussion, however, of the discriminatory provincial legislation and the joint impact of federal and provincial discrimination on the basic human rights of aboriginal people. This paper does not attempt to identify exhaustively every instance of statutory discrimination and its implications. It will, however, review the history of this issue and examine both federal and provincial strands of legislation. The word "discrimination" will be used in the sense of legal distinctions singling out aboriginal people for special treatment and operating to the detriment of their fundamental human rights.

(*) This paper is based on work by Wendy Moss in 1987. It has been reviewed and updated by Elaine Gardner O'Toole.

(1) *Constitution Act, 1867*, (U.K.) R.S.C. 1970, Appendix II, No. 5, s. 91(24).

(2) *Indian and Northern Affairs Canada, Indian Acts and Amendments, 1868-1950, and Contemporary Indian Legislation, 1951-1978*, Ottawa, 1981.

It is worth noting that, before Confederation, race relations in the territories that eventually formed Canada began with slavery, primarily involving Indian slaves (called "Panis" or "Pawnees").⁽³⁾ While in the 1790s legislative action in Upper Canada and judicial action in Lower Canada signalled the end of slavery, it was not until 1833 that the *Act for the Abolition of Slavery* finally abolished this practice in the British Empire.⁽⁴⁾ Paradoxically, however, the colonial period brought an important shift in the non-native perception of Indians: from being viewed as independent and (arguably) sovereign peoples sought after as allies in colonial wars, Indian nations began to be viewed as dependent groups of Crown subjects in need of protection and "civilization."

It is generally accepted that the often conflicting goals of "civilization," assimilation, and protection of Indian peoples that have been pursued throughout the history of federal Indian legislation have their origin in (primarily British) colonialism.⁽⁵⁾ Throughout the colonial and post-Confederation periods, governments vacillated between two policies. The isolationist policy held that assimilation could best be achieved by isolating Indians on reserves, with Indian agents gradually preparing them for integration with the dominant society. (Alternatively, isolation was viewed by some simply as a protective measure until the Indian people should become extinct). The policy of immediate assimilation, on the other hand, favoured immediate placement of Indians among non-native people and removal of special protective measures and legal status. The isolationist policy has predominated but, as some observers have noted, it has had the unintended result of preserving Indian cultures and providing a means for the Indian people to resist assimilative pressures. Accordingly, Indians have fought to retain their reserves,

(3) Walter Tarnopolsky and William Pentney, *Discrimination and the Law*, DeBoo, Don Mills, 1985, p. 1-1.

(4) *Ibid.*, p. 1-2.

(5) See John Leslie and Ron Maguire, ed., *The Historical Development of the Indian Act*, 2nd ed., Indian and Northern Affairs Canada, Ottawa, 1978 and Richard H. Bartlett, "Citizens Minus: Indians and the Right to Vote," 44 Sask. Law Rev. (1980), 163.



treaty rights and special legal status as a way of maintaining distinct cultural or national identities.

While Indian people view reserve and treaty rights as a *quid pro quo* for giving up a good part of their traditional lands, federal and provincial governments have frequently taken the view that the Indians' refusal to abandon their distinctive cultures, governments and identities is a refusal to take up the ways of a more "advanced civilization" and accordingly, a refusal to take up the "responsibilities" of full citizenship. In the result, the history of native policy, particularly Indian policy, in Canada is replete with examples of legal bars to the exercise of fundamental civil, political and cultural rights.

CIVIL AND POLITICAL RIGHTS

A. The Federal and Provincial Franchise

In the colonial period, though legislation did not explicitly deny the franchise to aboriginal people, property qualifications effectively excluded the vast majority of them (i.e., those living on reserves or in unceded territory). The early electoral statutes essentially linked the franchise to ownership in fee simple of land of a specified minimum value. Title to aboriginal lands, however, was considered to vest in the Crown with the use and benefit accruing to the aboriginal people.

By 1857, in the Province of Canada an Indian man could qualify for the right to vote by applying for enfranchisement and receiving an allotment of reserve lands, which would be subject to assessment and taxation.⁽⁶⁾ Enfranchisement simply removed all distinctions between the legal rights and liabilities of Indians and those of other British subjects. It did not in itself, grant an entitlement to vote. Enfranchisement did, however, require the abandonment of reserve rights and

(6) *An Act for the Gradual Civilization of the Indian Tribes in This Province, and to Amend the Laws Respecting Indians*, S.C. 1857, c. 26.

the right to live with one's family and culture. Further, it was dependent upon proof of literacy, education, morality and solvency. Consequently, the requirements for enfranchisement constituted discriminatory conditions imposed on Indians to qualify for the right to vote.

After 1867, the colonial form of enfranchisement policy was continued by federal legislation in 1868⁽⁷⁾ and then modified in 1869, so that enfranchisement and a life estate in an allotment of reserve lands could be granted to any Indian male "who from the degree of civilization to which he has attained, and the character for integrity and sobriety which he bears, appears to be a safe and suitable person for becoming a proprietor of land."⁽⁸⁾

Upon Confederation, the federal franchise was determined by the requirements of the provincial franchise.⁽⁹⁾ As the provinces continued to restrict the franchise to males possessed of substantial property, aboriginal people were again, for all practical purposes, excluded.⁽¹⁰⁾ Thus in the early days of Canada's history the interaction between provincial and federal electoral laws, enfranchisement policy (with its inherently negative judgment of Indian culture) and judicial interpretations of the nature of Indian title resulted in the denial of the federal and provincial franchise to aboriginal people.

The irony of denying aboriginal people the right to vote through property ownership requirements is illustrated by the fact that as late as 1969 "any British subject" resident in Canada 12 months prior to an election had a right to vote; the definition of "British subject"

(7) *An Act Providing for the Organization of the Department of the Secretary of State of Canada*, S.C. 1868, c.42, s. 33.

(8) *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act*, 31st Victoria, Chapter 42, S.C. 1869, c.6, s. 13.

(9) *Constitution Act, 1867*, (U.K) R.S.C. 1970, Appendix II, No. 5, s. 41.

(10) Bartlett (1980), at p. 164.



included citizens of the Union of South Africa, despite that country's departure from the Commonwealth in 1961.⁽¹¹⁾

British Columbia was one of the first provinces to pass legislation expressly disqualifying people from the franchise on grounds of race. In 1875, this province passed legislation providing that "no Chinaman or Indian" could vote.⁽¹²⁾ Similar voting disabilities applied to Indians and other racial groups under legislation such as the *Municipal Elections Act*⁽¹³⁾ and the *Public School Act*.⁽¹⁴⁾ These racially discriminatory provisions of British Columbia's electoral laws were upheld as valid legislation by the Judicial Committee of the Privy Council in *Cunningham and A.-G. for B.C. v. Tomey Homma and A.-G. for Canada*. The Judicial Committee declared that "the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider."⁽¹⁵⁾

As British Columbia had done in 1875, New Brunswick introduced male suffrage in 1889 and disqualified Indians in general⁽¹⁶⁾ as did Saskatchewan in 1908⁽¹⁷⁾ and the Yukon in 1919.⁽¹⁸⁾ By not defining the word "Indian," these provisions may have excluded enfranchised Indians as well. At various times, all the other provinces except Nova

(11) Margaret A. Banks, "The Voting Rights of Persons Other than Canadian Citizens in Federal and Provincial Elections" (1969), 8 *Western Ontario Law Review* 147.

(12) *An Act to Make Better Provision for the Qualification and Registration of Voters*, S.B.C. 1875, c. 2.

(13) The B.C. *Municipal Elections Act* from 1896 (S.B.C. 1896 c. 38) to 1948 (R.S.B.C. 1948, c. 105) prohibited voting at any municipal election of a Mayor, Reeve, Alderman or Councillor, by Indians, Chinese, Japanese (and from 1908 to 1936 "other Asiatics").

(14) Similar racial disqualifications existed for elections under the *Public School Act* from 1884 (S.B.C. 1884, c. 27) to 1948, (R.S.B.C. 1948, c. 297).

(15) [1903] A.C. 151 at 155-156.

(16) *The New Brunswick Elections Act of 1889*, S.N.B. 1889, c. 3, s. 24.

(17) *The Saskatchewan Election Act*, S.S. 1908, c. 2, s. 11.

(18) *An Ordinance Respecting Elections* O.Y.T. 1919, c. 7, s. 35.

Scotia and Newfoundland passed legislation that in one way or another disqualified Indians from voting. Ontario in 1874 excluded all but enfranchised Indians⁽¹⁹⁾ and then specified that enfranchised Indians not resident on reserves, even if in receipt of annuities, were eligible to vote, if otherwise qualified.⁽²⁰⁾ Manitoba disqualified Indians or persons of Indian blood receiving an annuity from the Crown (1886).⁽²¹⁾ Alberta excluded all persons of Indian blood who belonged or were reputed to belong to any band of Indians (1909).⁽²²⁾ Quebec excluded Indians and individuals of Indian blood domiciled on land reserved for Indians (1915).⁽²³⁾ P.E.I. excluded Indians ordinarily resident on an Indian reservation (1922).⁽²⁴⁾ In the Northwest Territories, unenfranchised Indians were excluded.⁽²⁵⁾

Federally, blatant racial discrimination first appeared in 1885. The *Electoral Franchise Act*, the first federal franchise Act, extended the right to vote in federal elections to certain Indians by providing that the word "person" meant male person, including an Indian but disqualifying:

Indians in Manitoba, British Columbia, Keewatin and the North-West Territories, and any Indian on any reserve elsewhere in Canada who is not in possession and occupation of a separate and distinct tract of land in such reserve, and whose improvements on such separate tract are not of the value of at least one hundred and fifty dollars, and who is not otherwise possessed of

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- (19) *An Act to Further Amend the Laws Affecting the Elections of Members of the Legislative Assembly and the Trial of Such Elections*, S.O. 1874, c. 3, s. 15.
- (20) *An Act to Further Amend the Law Respecting Elections of Members of the Legislative Assembly, and Respecting the Trial of Such Elections*, S.O. 1875-6, c. 10, s. 4.
- (21) *The Election Act, 1886*, S.M. 1886, c. 29, s. 130.
- (22) *The Alberta Election Act*, S.A. 1909, c. 3, s. 10.
- (23) *An Act to Amend the Quebec Election Act*, S.Q. 1915, c. 17, s. 5.
- (24) *The Election Act, 1922*, S.P.E.I. 1922, c. 5, s. 32.
- (25) *Proclamation Relating to Electoral Districts and Elections in the North-West Territories*, O.N.W.T. 1881, s. 17, 18.



the qualifications entitling him to be registered on the list of voters under this Act.(26)

The interesting history of the 1885 Act and its repeal in 1898 has been discussed in some detail elsewhere.(27) It is worth noting that Sir John A. Macdonald was prepared originally to extend the federal vote to all Indians, whether enfranchised or not, without conditions different from those imposed on other British subjects. The Prime Minister also maintained that the different nature of Indian title should not prevent recognition of the right of Indians to vote.(28) Heated debate in the House, however, as a result of the Opposition's virulent opposition to granting the vote to any Indians, resulted in the compromise evident in the 1885 Act, whereby Indians in areas recently involved in the Metis-Indian rebellion were excluded. Bartlett has identified the great number of reasons Opposition members gave, during the House debate, for denying the vote to Indians in general:

- Indians were incapable of exercising the franchise;
- Indians were not capable of civilization and would eventually become extinct;
- Indians were utterly incapable of managing their own affairs and the numerous legal disabilities imposed on them by the *Indian Act* made extension of the franchise inappropriate;
- No representation without taxation;
- Vote should not be extended to Indians involved in the 1885 rebellion;
- Indian property interests in reserve lands not equivalent to non-native property interests;
- Indians should not have the vote while under the discretionary care of the government;
- Indians were too much controlled by government and therefore interference by Indian agents was possible;
- Fear that the true intent of the bill was gerrymandering;
- Extending the vote represented an encroachment on the rights of white men.

Bartlett has also noted the various epithets used in debate, by opponents of the 1885 bill, to describe Indians: "the low and filthy Indians of the

(26) *The Electoral Franchise Act*, S.C. 1885, c. 40, ss. 2, 11.

(27) Bartlett (1980); Malcolm Montgomery, "The Six Nations Indians and the Macdonald Franchise," *Ontario History*, Vol. 57, No. 1, March 1965, p. 13.

(28) Bartlett (1980), p. 169, 172.

reserves," "barbarians," "ignorant and barbarous," "brutes," "dirty, filthy, lousy Indians," "savages." (29)

It would not be until the advent of human rights legislation following World War II that legal remedies would be available for discriminatory action and that federal and provincial governments would initiate legislative changes to conform with human rights philosophy.

The process of eliminating this form of legislated discrimination began when federal and provincial governments extended the right to vote first to Indians, enfranchised or not, who did not reside on reserves, (30) then to Indians with service in the armed forces, and then to their spouses. (31) Quebec appears to be the only province not to have provided an exemption for service in the armed forces.

In 1950, the federal franchise was extended to Indians only if they waived their tax exemptions under the *Indian Act* respecting personal property. (32) Universal adult suffrage was not finally achieved federally until 1960, with the unqualified extension of voting rights to all Indians under the *Act to Amend the Canada Elections Act*, and

(29) *Ibid.*, p. 175.

(30) *Dominion Elections Act*, S.C. 1920, c. 46, s. 29(1); *The New Brunswick Elections Act*, 1944, S.N.B. 1944, c. 8, s. 34; *Provincial Elections Act Amendment Act*, 1947, S.B.C. 1947, c. 28, s. 14; *The Saskatchewan Election Act*, 1951, S.S. 1951, c. 3, s. 29.

(31) World War I, World War II, Korean War: *Military Votes Act*, S.C. 1917, c. 34, s. 2; *Dominion Elections Act*, S.C. 1920, c. 46, s. 29(1); *The Election Act*, 1922, S.P.E.I. 1922, c. 5, s. 31; *The Election Act*, 1926, S.O. 1926, c. 4, s. 19, 23; *The Manitoba Election Act*, S.M. 1931, c. 10, s. 16(5); *The Statute Law Amendment Act*, 1939 (No. 2), S.O. 1939 (2nd sess.) c. 11, s. 3; *An Act to Amend the Dominion Election Act*, 1938, S.C. 1948, c. 46, s. 6; *An Act to Amend The Dominion Elections Act*, 1938, and to Change its Title to *The Canada Elections Act*, S.C. 1951 (2nd sess.) c. 3, s. 6; *The New Brunswick Elections Act*, 1944, S.N.B. 1944, c. 8, s. 34(2); *The Manitoba Election Act*, R.S.M. 1940, c. 57, s. 16(5); *An Act to Amend "The Election Act"*, 1922, S.P.E.I. 1946, c. 10, s. 2; *Provincial Elections Act Amendment Act*, 1945, S.B.C. 1945, c. 26, s. 3; *The Saskatchewan Election Act*, 1951, S.S. 1951, c. 3, s. 29; *The Election Act*, S.A. 1956, c. 15, s. 16(b).

(32) *An Act to Amend the Dominion Elections Act*, 1938, S.C. 1950, c. 35, s. 1.

provincially until 1969, when Quebec became the last province so to extend its provincial franchise,⁽³³⁾ after British Columbia in 1949,⁽³⁴⁾ Manitoba (1952),⁽³⁵⁾ Ontario (1954),⁽³⁶⁾ Saskatchewan (1960),⁽³⁷⁾ P.E.I. (1963),⁽³⁸⁾ New Brunswick (1963),⁽³⁹⁾ and Alberta (1965).⁽⁴⁰⁾ Following the removal of these legal disabilities, there were reports that Indians hesitated to exercise their right to vote for fear of weakening their claims to treaty rights and tax exemptions.⁽⁴¹⁾

The denial of the franchise to aboriginal people had meant that they were also prevented from serving on juries. Even after extension of the federal and provincial franchise there was a practice of omitting Indians' names from voters' lists compiled for this purpose. The first time Indians served on a Canadian jury is reported to have been 24 January 1972.⁽⁴²⁾

Only the federal government appears to have discriminated expressly against the Inuit in its electoral laws. "Esquimaux" were disqualified from voting federally in 1934⁽⁴³⁾ with no exemptions for

(33) *An Act to Amend the Election Act*, S.Q. 1969, c. 13, s. 1.

(34) *Provincial Elections Act Amendments Act*, 1949, S.B.C. 1949, c. 19, ss. 2, 3.

(35) *An Act to Amend the Manitoba Election Act*, S.M. 1952, c. 18, ss. 15, 16.

(36) S.O. 1954, c. 25.

(37) *An Act to Amend the Saskatchewan Election Act*, S.S. 1960, c. 45, s. 1.

(38) Bartlett (1980), p. 193.

(39) *An Act to Amend the Elections Act*, S.N.B. 1963, c. 7.

(40) *An Act to Amend the Election Act*, S.A. 1965, c. 23.

(41) "The Indians Got the Vote this Year, but Fear Kept Many of Them Away from the Polls," *Maclean's Report*, July 14, 1962.

(42) *The Indian News*, (1972), Vol. 14, No. 10.

(43) *The Dominion Franchise Act*, S.C. 1934, c. 51, s. 4.

service in the armed forces.⁽⁴⁴⁾ The Inuit received an unqualified right to the franchise in 1950.⁽⁴⁵⁾

It should be pointed out that exclusion from the franchise had not disqualified aboriginal people from certain privileges or rights available to British subjects, such as appointment to the Senate, or election to the House of Commons. Senator Gladstone, a Blood Indian, was appointed in 1958 to the Upper House, though he could not vote in federal or provincial elections. Further, in 1870, an Ontario court held that an Indian who was a British subject and otherwise qualified, even though not enfranchised, could hold the position of Reeve of a municipality.⁽⁴⁶⁾

B. Self-Government

Official recognition of the fact that aboriginal peoples have had their own legitimate forms of political institutions is very recent (the 1983 Report of the Special Committee on Indian Self-Government). Before contact with Europeans and to a large extent afterwards, aboriginal people did not rely on the written word, but rather on a variety of distinctive ways to organize, operate and record political ideals and institutions. Examples of these were oral traditions, wampum belts and potlatch ceremonies. The significance of these has not been appreciated by the dominant non-native society; consequently, they have frequently been ignored or legally suppressed while the federal government has tried to impose a uniform set of Euro-Canadian political ideals on vastly differing native societies from coast to coast.

The imposition of the Euro-Canadian political ideal of elected local government began soon after Confederation. The 1869 "Act for the gradual enfranchisement of Indians..." provided that the federal government could order the establishment of an elected band council as well as the removal from office of those considered by the federal government to be unfit to hold office "for dishonesty, intemperance or immorality." Limited recognition was given to aboriginal custom by

(44) Bartlett (1980), p. 186.

(45) S.C. 1950, c. 35.

(46) *Gibb v. White* [1870] P.R. 315.



continuing the tenure of existing "life chiefs" only, until their death, resignation or removal by the government.⁽⁴⁷⁾ This Act was aimed at bands in the older settled regions, considered to be more advanced and prepared to take further steps toward the ultimate goal of "civilization."⁽⁴⁸⁾ However, these bands were given only very limited powers of local government, essentially minor by-law making powers over public health and maintenance of peace and order, and even these were subject to confirmation by the government.⁽⁴⁹⁾

The first consolidated *Indian Act* (1876) was again primarily aimed at speeding up the "civilization" of Indians living east of Lake Superior (western Indians were exempted from many of its provisions). The Act gave the government power to impose an elected band council system and set out in some detail how that system would operate. Government policy was to apply the system only upon request and to encourage such requests, band councils were given slightly increased authority.⁽⁵⁰⁾

By 1880, the very Indians who were intended to take advantage of the Act had made clear their rejection of its restricted elective system and their distaste for the degree of federal control. These protests were seen as further evidence of a need to guide and direct aboriginal people.⁽⁵¹⁾ The 1880 *Indian Act*⁽⁵²⁾ clearly stated the government's intent to impose the style of elective government it deemed advisable for the "good government" of bands. It continued to provide broad criteria for the removal of elected officers. In addition, the Act stripped traditional Chiefs of their authority unless elected, where an elective system had been imposed.

(47) S.C. 1869, s. 10.

(48) John L. Tobias, "Protection, Civilization, Assimilation: An Outline of Canada's Indian Policy," *The Western Canadian Journal of Anthropology*, (1976), Vol. VI, no. 2, p. 13 at p. 17.

(49) S.C. 1869, c. 6, s. 12.

(50) Tobias (1976), p. 17.

(51) *Ibid.*, p. 19.

(52) *The Indian Act, 1880*, S.C. 1880, c. 28, s. 72.

The government continued to experiment with ways to repress the old "tribal system." *The Indian Advancement Act, 1884*⁽⁵³⁾ again offered slightly increased band council powers but also increased the government's power to direct the band's political affairs. For example, the Superintendent-General or an agent delegated by him was empowered to call elections, supervise them, call band meetings, preside over them and participate in them in every way except by voting and adjourning them.⁽⁵⁴⁾ Indians east of Lake Superior were further encouraged to request this elective system by the extension of the federal franchise in 1885. Despite these inducements, most bands refused to come under the Act and in 1898 the federal franchise was withdrawn.⁽⁵⁵⁾ The government continued to expand its control over band political affairs by removing elected traditional leaders and prohibiting their re-election under the 1884 legislation. In 1895, the Minister was given power to depose chiefs and councillors where the elective system did not apply.⁽⁵⁶⁾ "This amendment was included because the band leaders in the West were found to be resisting the innovations of the reserve system and the Government's effort to discourage the practice of traditional Indian beliefs and values."⁽⁵⁷⁾

Attempts were also made to suppress the West Coast potlatches and winter dance ceremonials. To the Indian people, these were important social, cultural and political conventions that provided a means of affirming leadership and social order and of recognizing property rights, inheritance and transfer of property. To the federal government, however, they symbolized the tribalism that it was intent on eliminating. Section 3 of *An Act Further to Amend The Indian Act, 1880* made the exercise of these practices a criminal offence:

3. Every Indian or other person who engages in or assists in celebrating the Indian festival known as the "Potlach" or in the Indian dance known as the

(53) S.C. 1884, c. 28.

(54) Tobias (1976), pp. 19-20.

(55) *Franchise Act*, S.C. 1898, c. 14.

(56) *An Act to Further Amend the Indian Act*, S.C. 1895, c. 35, s. 3.

(57) Tobias (1976), p. 20.

"Tamanawas" is guilty of a misdemeanor, and shall be liable to imprisonment ... and any Indian or other person who encourages ... an Indian or Indians to get up such a festival or dance, or to celebrate the same, ... is guilty of a like offence ...(58)

Indian opposition to the *Indian Act* system of elective government continued, punctuated by periodic government attempts to suppress completely all traditional forms of aboriginal government. In the 1920s, the Canadian government jailed the traditional leaders of the Haudesaunee, raided the council hall, seized all official records and symbols of government and installed an *Indian Act* council. The anti-potlatch laws continued as late as 1951; under them, arrests were made and ceremonial items and symbols of government seized and in many cases never returned. (59)

Apart from the 1985 amendments to eliminate sex discrimination and to increase band control over band membership, the last major revision of the *Indian Act* took place in 1951. In 1969, a federal White Paper suddenly proposed immediate integration by dismantling the *Indian Act* system completely and removing all legal distinctions between Indians and other Canadians. Rejected with great hostility by Indian groups, the proposal was quickly dropped. Later, attempts to reach agreement with Indian groups on a major revision of the Act also failed.

Over the last 20 years, there has been some acceptance of aboriginal people's desire to retain and to protect their special legal status in the Constitution. For example, "existing aboriginal and treaty rights" are now constitutionally protected. (60) However, the constitutional conferences held pursuant to the *Constitution Amendment Proclamation, 1983* failed to result in an agreement on how to recognize an aboriginal right to self-government in the Constitution. In the autumn of 1991, the federal government, as part of its initiative for

(58) S.C. 1884, c. 27.

(59) Canada, House of Commons, Report of the Special Committee on Indian Self-Government, 1983, p. 13.

(60) *Constitution Act, 1982*, ss. 25 and 35 (Schedule B to *Canada Act 1982*, U.K. Stats. 1982, c. 11).



constitutional renewal, proposed that the right to self-government be entrenched in the *Constitution Act, 1982*. The Assembly of First Nations has reiterated its desire to seek constitutional recognition of an inherent right to self-government. While these developments appear promising, it remains to be seen whether the *Constitution Act, 1982* will be amended.

Outside the constitutional reform process, two groups have successfully negotiated self-government arrangements which take them out of the *Indian Act* for purposes of local government. The James Bay Cree arrangement was a consequence of the land claims settlement. The Sechelt Band arrangement was the result of a new policy allowing bands to negotiate increased powers either under the *Indian Act* or under a separate statute (the Sechelt chose the latter). A number of framework agreements for self-government under the federal government's community self-government policy have been signed, but not yet finalized. With respect to some bands, the negotiations are in the context of land claim agreements.

C. Property Rights

1. The Right to Homestead

In 1862, an Indian offered to buy a portion of Crown land at a public sale in British Columbia. Colonel Moody, who was conducting the sale, reacted with such surprise and shock that he felt compelled to write the colonial secretary for instructions. Three weeks later, the secretary, after consulting the Governor, replied that there could be no objection.⁽⁶¹⁾

Soon after this incident, the colony, and later the province, introduced legislation prohibiting aboriginal people from pre-empting (homesteading) but not from purchasing. Initially, the 1860 Land Ordinance had reserved Indian settlements from pre-emption but had not forbidden pre-emption by Indians. The colonial legislation defined the exclusion from pre-emption rights in the broadest possible way:

(61) Robert E. Cail, *Land, Man and the Law*, University of British Columbia Press, Vancouver, 1974, p. 177.



Provided that such right of pre-emption shall not be held to extend to any of the *Aborigines of this Continent*, except to such as shall have obtained the Governor's special permission in writing to that effect. (62)

[emphasis added]

The Province of British Columbia retained this provision in successive Land Acts at least until 1948. (63) A related provision prohibited any "Indian" or "Chinaman" from acting as an agent for a homesteader trying to fulfill the statutory requirements of occupation. (64) The practical effect of this legislation and B.C. native land policy was that non-native settlers were permitted to homestead 320 acres of land, while future reserves for Indians were to be limited to 20 acres for each head of family of five persons. (65) Existing B.C. reserves were frequently much smaller.

Indians in the remainder of the West suffered a similar disability under federal law. The Crown lands of what is now Alberta, Saskatchewan and Manitoba were administered by the Canadian government until 1930. Accordingly, homestead laws in these areas came under federal jurisdiction. Under the heading, "Disabilities and Penalties," section 70 of the 1876 *Indian Act* prohibited Indians from homesteading on the prairies. (66)

Some Members at the time questioned the discriminatory intent of section 70. On the other hand, some contemporary observers have stated that its clear intent was to prevent Indians who had signed treaties from receiving both a share of reserve land and a homestead. (67) However, the provision expressly applied to non-treaty and treaty Indians alike and in addition, most of the western treaties allowed for a maximum of 160 acres or 1 square mile per family of five (and proportionally less for smaller families) whereas federal homestead laws allowed free land

(62) *An Ordinance to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia*, S.B.C. 1870, c. 18.

(63) *Land Act*, R.S.B.C. 1948, c. 175, s. 12(2)(a).

(64) *The Land Ordinance Amendment Act, 1873*, S.B.C. 1873, c. 1, s. 2.

(65) Cail (1974), p. 200.

(66) S.C. 1876, c. 18, s. 70.

(67) Leslie and Maguire (1978), p. 67.

grants ranging from 160 to 320 acres per head of family. Section 70 of the 1876 *Indian Act* would seem clearly to represent a further aspect of the isolationist policy for unenfranchised Indians; i.e., the privileges and benefits generally available to the rest of society were to be withheld as inducements for these Indians to abandon their distinctive identities and adopt European ways.

Section 10 of the 1876 Act made it even clearer that a western Indian could not acquire a "free" grant of Crown lands other than through a share of reserve land. This provision simply merged any improved land possessed by an individual Indian with reserve land where the individual plot was to be included or surrounded by a reserve. The Indian then had the same "privilege" as an Indian holding under a reserve location ticket.

The prohibition against Indian homesteading remained in effect until the Act was repealed in 1951.⁽⁶⁸⁾

2. Restricted Right to Sell Agricultural Products

Further restrictions were placed on the property rights of western Indians by section 1 of *An Act to Amend "The Indian Act, 1880,"*⁽⁶⁹⁾ which prohibited the sale of agricultural products grown on reserves in the Territories, Manitoba or the District of Keewatin, except in accordance with government regulations. Though some Members objected, Prime Minister Macdonald defended the provision as a measure to prevent the sale of goods "for liquor or other worthless items." This provision was retained in the 1888 Act and an Order in Council was passed the same year prohibiting the sale of agricultural products by western Indians without the consent of an Indian agent.⁽⁷⁰⁾ A statutory amendment to this effect was passed in 1930⁽⁷¹⁾ and a similar prohibition applying to all Indians was enacted in 1941, restricting the sale of wild animals and furs.⁽⁷²⁾

(68) S.C. 1951, c. 29.

(69) S.C. 1881, c. 17.

(70) Leslie and Maguire (1978), p. 93.

(71) *An Act to Amend the Indian Act*, S.C. 1930, c. 25, s. 6.

(72) *An Act to Amend the Indian Act*, S.C. 1940-41, c. 19.



The agricultural products provision remained unchanged until sections 32 and 33 of the 1951 Act broadened its application to all Indians and made such transactions void unless approved by the Superintendent in writing. However, the Minister could exempt individual bands and individual band members.

3. Wills and Estates

Prior to 1876, Indian legislation provided that enfranchised Indians could assign property by will⁽⁷³⁾ but said nothing about the devolution of property of unenfranchised Indians. Section 9 of the 1876 *Indian Act* set out various formulas for the division of property of any male Indian dying intestate: for example, if there was no next of kin closer than a cousin, any property would vest in the Crown for the benefit of the band. Since there was still no provision allowing unenfranchised Indians to will their property, Indians had no say in how their property would be inherited.

The *Indian Act*, 1880 had a similar but more detailed provision, section 20, that also gave the Superintendent-General the power at any time to remove a widow from the administration and charge of reserve land (held under location ticket) and of any goods held by her on behalf of minor children. The Superintendent-General was essentially an executor with extraordinary powers to remove, at will, any guardian (including the widow) of the children of a deceased Indian. There were no provisions for the separate devolution of property of Indian women.

In 1884,⁽⁷⁴⁾ a similar provision was enacted that also allowed an Indian holding reserve land under a location ticket to will the parcel and other property to family members or relatives. A number of restrictions were placed on this right, including requirements for band consent to the will and for no bequest to be made to any relative further removed than a second cousin. New restrictions were placed on the right of a widow to inherit by intestacy from her husband and to administer his

(73) *An Act to Amend Certain Laws Respecting Indians*, S.C. 1874, c. 21. s. 9.

(74) *An Act Further to Amend The Indian Act, 1880*, S.C. 1884, c. 27, s. 5.



estate on behalf of the children. In either case, the widow had to be "a woman of good moral character" and living with her husband at the date of his death.

In 1894, section 20 was again amended by *An Act to Further Amend "The Indian Act."*⁽⁷⁵⁾ Band consent was no longer required for a will to be valid but consent of the Superintendent-General was necessary for disposal of any interest in reserve land. In the case of an Indian male dying intestate, his widow, to be entitled to inherit property or to manage it on behalf of the children, need no longer have been living with him at the date of his death. The Act specified, however, that the Superintendent-General would be the sole and final judge as to the moral character of the widow. Changes were made to the division of property and for the first time, the Act provided that the property of a married Indian woman would devolve in the same way as that of a man.

In 1906, the *Indian Act* for the first time dealt with the disposal of the property of unmarried Indian women: "the property of an unmarried Indian woman who dies intestate shall descend in the same manner as if she has been male."⁽⁷⁶⁾

Later amendments, in 1914 and 1924, gave the Superintendent General power to appoint administrators for the estate of any deceased or insane Indian, and removed the "good moral character" requirement, though only in the case of an Indian dying intestate with no issue.⁽⁷⁷⁾ The "good moral character" condition was reinstated in 1927:

Upon the death of an Indian intestate his property of all kinds, real and personal, movable and immovable, including any recognized interest he may have in land in a reserve, shall descend as follows:

- (a) One-third of the inheritance shall devolve upon his widow, if she is a woman of good moral character, and the remainder upon his children, if all are living, or, if any who are dead have died without issue;

(75) S.C. 1894, c. 32, s. 1.

(76) *Indian Act*, R.S.C. 1906, c. 81, s. 29(3).

(77) *An Act to Amend the Indian Act*, S.C. 1914, c. 35, s. 5; *An Act to Amend the Indian Act*, S.C. 1924, c. 47, s. 2, 3.



- (b) If there is no widow, or if the widow is not of good moral character, the whole inheritance shall devolve upon his children in equal shares, if all are living, or if any who are dead have died without issue.(78)

The 1951 *Indian Act* reworked the language of the provisions dealing with descent of property, removed the "good moral character" requirements but kept in the Minister very broad powers over the administration of wills and estates. There is some pressure to change the Act to make it more responsive to aboriginal customs. The *Cree-Naskapi (of Quebec) Act*, which has replaced the *Indian Act* with respect to the Cree of James Bay and Northern Quebec, contains provisions authorizing the descent of property according to Cree customs. (79)

The Minister, however, has very broad discretionary powers over matters and causes testamentary where Indians resident on reserve or Crown lands are concerned. For example, the Minister may appoint or remove executors and administrators of estates,(80) or may declare a will void for various reasons.(81) While the Minister's decision under these particular provisions may be appealed to the Federal Court of Canada, the right of appeal under the statute does not apply to all the Minister's decisions. Much of the Minister's authority has been delegated to other officials. Under provincial legislation applicable to Canadians to which the *Indian Act* does not apply, there is no such discretion vested in a government representative. Legislation is much more detailed and matters must be adjudicated, or directions sought, from the courts.

In 1985, subsections 48(13) and (14) were repealed. These provisions determined the rules under which illegitimate children inherited in an intestacy situation. Furthermore, the definition of "child" for the purposes of distribution of property on intestacy was amended to include a child born in or out of wedlock. Consequently, it is now clear that legitimacy is an irrelevant consideration with respect to the right to inherit property pursuant to the *Indian Act*. Section 48(2) was also

(78) *Indian Act*, R.S.C. 1927, c. 98, s. 26.

(79) S.C. 1984, c. 18, Part XIII.

(80) *Indian Act*, R.S.C. 1951, c. 29, s. 46.

(81) *Ibid.*, s. 43.



amended, increasing the spousal share on intestacy from \$2,000 to \$75,000. The changes in 1985 ensured that, with respect to these two particular issues, the *Indian Act* is more consistent with provincial legislation.

FEDERAL CONTROL OF INDIAN STATUS AND MINORITY RIGHTS IN INTERNATIONAL LAW

Until recently, the enfranchisement of Indians was one of the major objectives of federal Indian legislation. Enfranchisement brought the end of special legal status and the end of legal acknowledgment of a separate Indian identity. To the government, it meant the end of its special legal obligations and the successful absorption of a minority culture. Enfranchisement has traditionally been equated with "civilization," that is, the abandonment of a culture perceived to be inferior and savage for a "superior" European one. From a human rights perspective, enfranchisement policies, whether voluntary or compulsory, have had a number of objectionable aspects. Voluntary enfranchisement has required Indians to prove that they were civilized in order to leave the legal regime of the *Indian Act* and to exercise civil and political rights available to non-natives such as the right to vote or to homestead Crown land. Compulsory enfranchisement has forced hundreds of thousands of Indians to leave their communities, language and culture.

In addition, the definition of the word "Indian" under the *Indian Act* and earlier legislation has determined who has the right to reside on a reserve and to participate in programs made available to reserve residents and the broader group of "status Indians." The necessity of strictly defining "Indian" and accordingly, restricting access to many Indian rights, including treaty rights, was claimed to be justified as a protective measure. In particular, the now repealed section 12(1)(b), which took away the Indian status of a woman who married a "non-status" man, was claimed to be necessary to prevent the domination and exploitation of reserve communities by white men. Some question this claim, since Indian women could not regain Indian status even after divorce or death of



their non-Indian husbands (except by remarrying an "Indian").⁽⁸²⁾ The protective purpose was also called into question when examined in the historical context of enfranchisement policies:

As the maintenance of a dependent protected class came to be a large financial burden on the treasury, the pressure to reduce the size of the status group grew. The process of enfranchising was made progressively easier. The right of the band to consent to the enfranchisement of its members was eroded. Finally, the pressure to "integrate" the Indians resulted in the compulsory enfranchisement legislation of 1920 and 1923.

The trend in Indian legislation over time was clearly to integrate the Indian (whether he wished to or not) by the dual mechanism of the "shrinking" or increasingly restricted definition of the term "Indian" and enfranchisement, or the removal of Indians from status as they acquired the attributes of "White" civilization. The result today is that large group of natives outside the *Indian Act*: "non-status" Indians.⁽⁸³⁾

In 1981, the U.N. Human Rights Committee ruled that the operation of section 12(1)(b) of the Act constituted a breach by Canada of article 27 of the *International Covenant on Civil and Political Rights*. The compulsory loss of status under the Act and the resulting denial of the right to continue living on a reserve was held to constitute a denial of Sandra Lovelace's right, as a member of a minority, to have access to her native culture and language in community with the other members of her group. The federal government has since repealed section 12(1)(b)⁽⁸⁴⁾ and has developed policy and programs to allow bands to define their own membership and to separate band membership from status under the Act. These amendments and related policies have themselves become matters of

(82) Linda Rayner, *The Creation of A "Non-Status" Indian Population by Federal Government Policy and Administration*, Native Council of Canada, Ottawa, 1978, p. 13. See also Kathleen Jamieson, "Sex Discrimination and the *Indian Act*, *Arduous Journey*, J. Rick Printing ed., McClelland and Stewart, Toronto, 1986, p. 112 at p. 114.

(83) Rayner (1978), p. 4.

(84) *An Act to Amend the Indian Act*, S.C. 1985, c. 27.

some controversy and the question of the right of Indian and other aboriginal people to define themselves remains unresolved.

Other civil disabilities were imposed on Indians. For example, Indian children were forced to attend residential schools at great distance from their families and homes and were otherwise barred from participating in provincial school systems.⁽⁸⁵⁾ An amendment in 1882 prohibited appeals from decisions in cases involving only Indian parties where the sum did not exceed ten dollars.⁽⁸⁶⁾ This was intended to curtail "Indian fondness for petty litigation."

CRIMINAL LAW

Special criminal sanctions were intended to suppress certain traditional Indian social or political practices. Other measures, such as the restrictive liquor provisions, were considered to be protective.

A. Liquor Offences

The suppression of liquor sales to Indians began early in colonial history and became a fixture of federal and provincial legislation after Confederation. In 1868, the first federal statute dealing with aboriginal people had three separate sections prohibiting the sale or barter of liquor to Indians.⁽⁸⁷⁾ Penal sanctions (in the form of fines) were imposed only on the supplier of liquor at this time. In 1874, for an Indian to be found in a state of intoxication became an offence punishable by imprisonment of no more than one month; an additional period not exceeding 14 days was imposed if the Indian did not give the name of his supplier.⁽⁸⁸⁾ Exemption was made for suppliers of alcohol for

(85) Chief Joe Mathias, *Conspiracy of Legislation* (unpublished paper).

(86) Leslie and Maguire (1978), p. 81; *An Act to Further Amend The Indian Act, 1880*, S.C. 1882, c. 30, s. 4.

(87) *An Act Providing for the Organization of the Department of the Secretary of State of Canada*, S.C. 1968, c. 42, ss. 9, 12, 13.

(88) *An Act to Amend Certain Laws Respecting Indians ...*, S.C. 1874, c. 21, s. 1.

medical requirements. "Intoxicating liquor" was broadly defined to include all manner of drinks but also included opium and other intoxicating drugs or substances. All these provisions, from 1868 to 1874, were consolidated in the *Indian Act*, 1876,⁽⁸⁹⁾ which also expressly prohibited simple possession of liquor on a reserve by an Indian. The increasingly strict nature of post-Confederation liquor provisions has been attributed to commitments by the Government of Canada in Treaties No. 1 to 6 to exclude liquor from reserve lands and to protect Indians "from the evil influence of intoxicating liquors."⁽⁹⁰⁾

In 1886, supplying liquor to Indians became an offence punishable by imprisonment of up to six months, or a fine not exceeding \$300 and not less than \$50.⁽⁹¹⁾ As with previous legislation, half the fine went to the informer or prosecutor and half to the government for the benefit of the Indian band concerned. *The Indian Act* (1886) added the new offences of trafficking in liquor from vessels and manufacturing and trafficking in liquor by Indians. In addition, section 99 of the Act provided that anyone supplying liquor to Indians on an order from someone else, was to be held as liable as if he had supplied it independently. Section 99 also made it an offence, punishable as liquor trafficking, for anyone to be found drunk or gambling in an Indian residence, or to refuse to leave a reserve after sunset on order of an Indian agent. (This provision was amended in 1894, so that it was made an offence only to be drunk, gambling or in possession of intoxicants on any part of a reserve and the penalty was cut in half, to a maximum of three months' imprisonment or a fine between \$10 and \$50.⁽⁹²⁾

In 1887, being an Indian in a state of intoxication was made punishable by either fine or imprisonment or both. In addition, the police were empowered to arrest an intoxicated Indian without a warrant and to confine him until sober, at which point, he was to be brought to

(89) S.C. 1876, c. 18, ss. 79-85.

(90) University of Saskatchewan Native Law Centre, *Liquor Offences Under the Indian Act*, University of Saskatchewan Native Law Centre, Report No. 19, 1983, p. 2.

(91) *The Indian Act*, R.S.C. 1886, c. 43, s. 94.

(92) *An Act Further to Amend The Indian Act*, S.C. 1894, c. 32, s. 7.

trial.⁽⁹³⁾ By 1936, the *Indian Act* made possession by anyone of any intoxicant in the home of an Indian, whether on or off a reserve a criminal offence and abolished the practice of giving half of the fines collected for liquor offences to informers.⁽⁹⁴⁾

By 1950, work had begun on a new revision of the *Indian Act*. Bill 267, introduced on 7 June 1950, would have liberalized the liquor provisions as recommended by the 1948 Special Joint Committee Report on amendments to the *Indian Act*:

That the Indians be accorded the same rights and be liable to the same penalties as others with regard to the consumption of intoxicating beverages on licensed premises, but there shall be no manufacture, sale or consumption, in or on a reserve, of "intoxicants" within the meaning of the *Indian Act*.⁽⁹⁵⁾

In 1951, Indian representatives suggested three options: continuation of prohibition; application of provincial laws to Indians; or a compromise measure by which Indians would be allowed to consume intoxicants in public places according to provincial laws but not permitted to take liquor on to a reserve.⁽⁹⁶⁾ The eventual outcome, the 1951 *Indian Act*, controlled the possession and use of liquor by Indians off a reserve and by any person on a reserve.⁽⁹⁷⁾ The off-reserve provisions made it an offence for an Indian to have intoxicants in his possession or to be intoxicated off a reserve. Provision was made to allow off-reserve possession of intoxicants by Indians in accordance with provincial law, where the province requested a proclamation to that effect.

The 1951 Act defined "intoxicant" as "alcohol, alcoholic, spirituous, vinous, fermented malt or other intoxicating liquor or combination of liquors and mixed liquor a part of which is spirituous, vinous, fermented, or otherwise intoxicating and all drinks or drinkable

(93) *An Act to Amend "The Indian Act,"* S.C. 1887, c. 33, s. 10.

(94) *Indian Act*, R.S.C. 1927, c. 98, s. 126 and *An Act to amend the Indian Act*, S.C. 1936, c. 20, ss. 6-12.

(95) Leslie and Maguire (1978), p. 147.

(96) *Ibid.*

(97) S.C. 1951, c. 29, ss. 93-99.



liquids and all preparations or mixtures capable of human consumption that are intoxicating." This definition was much broader than that in laws applicable to all Canadians, and carried a heavier penalty than was provided for in other provincial and territorial legislation respecting intoxication in a public place.

Intoxication, (section 95(b) of R.S.C. 1970, c. I-6) in the absence of a provincial proclamation, and possession of intoxicants (section 95(a) of R.S.C. 1970, c. I-6) therefore became discriminatory off-reserve restrictions applying only to Indians. Other off-reserve offences included the making or manufacturing of intoxicants by an Indian (section 95(c) of R.S.C. 1970, c. I-6) and knowingly selling, bartering, supplying or giving an intoxicant to an Indian (section 94(a)(ii)).

In *R. v. Drybones*⁽⁹⁸⁾ the Supreme Court of Canada held that the off-reserve intoxication offence (section 95(b) of R.S.C. 1970, c. I-6) was inoperative as a contravention of the guarantee of equality before the law without discrimination by reason of race, under the *Canadian Bill of Rights*,⁽⁹⁹⁾ After *Drybones*, no one was prosecuted for off-reserve liquor offences, but there were conflicting court decisions on alcohol control and uncertainty about the future operation or application of section 95(b).

In 1985, Bill C-31, an Act to Amend the *Indian Act* was passed, repealing the substantive provisions relating to liquor offences on and off reserve. In their place, band councils were given by-law powers:

- 1) to prohibit the sale, barter, supply and manufacture of intoxicants on the reserve;
- 2) to prohibit any person from being intoxicated on the reserve;
- 3) to prohibit any person from having intoxicants in his or her possession on the reserve;
- 4) to provide for exceptions.⁽¹⁰⁰⁾

(98) [1970] S.C.R. 282.

(99) R.S.C. 1970, Appendix II.

(100) *An Act to Amend the Indian Act*, S.C. 1985, c. 27, s. 16, 17.

B. Other Criminal Offences

Indian people have suffered a number of criminal sanctions for traditional cultural and political practices. The suppression of the potlatch and winter dance ceremonials has been discussed above, under self-government. The first such provision, enacted in 1880 (quoted above) was amended and broadened in 1895.⁽¹⁰¹⁾ A further provision, aimed at Indian dances in general taking place off-reserve, was enacted in 1914:

2. Any Indian in the province of Manitoba, Saskatchewan, Alberta, British Columbia, or the Territories who participates in any Indian dance outside the bounds of his own reserve, or who participates in any show, exhibition, performance, stampede or pageant in aboriginal costume without the consent of the Superintendent General of Indian Affairs or his authorized Agent, ... shall on summary conviction be liable to a penalty not exceeding twenty-five dollars or to imprisonment for one month, or to both penalty and imprisonment.⁽¹⁰²⁾

The persistence of the Nishga in pursuing recognition of their land rights eventually led to a criminal law prohibition in 1927 against the collection of funds for claims suits without the written consent of the Superintendent-General.⁽¹⁰³⁾

Cultural conflicts appear to have underlain the special application of vagrancy and truancy laws to native people. In 1889, Indian agents were given powers as justices of the peace for the purposes of the *Vagrancy Act*, which was expected to be strictly applied to Indians.⁽¹⁰⁴⁾ In 1927, the Superintendent-General was given power to regulate Indian access to poolrooms on reserves. In 1930, a statutory amendment allowed a magistrate's court to ban an Indian from a poolroom on or off reserve, where the Indian "by inordinate frequenting of a poolroom on or off a reserve, misspends or wastes his time or means to the detriment of himself, his family or his household."⁽¹⁰⁵⁾

(101) *An Act Further to Amend the Indian Act*, S.C. 1895, c. 35, s. 6.

(102) *An Act to Amend the Indian Act*, S.C. 1914, c. 35, s. 8.

(103) *Indian Act*, R.S.C. 1927, c. 98, s. 141.

(104) Leslie and Maguire (1978), p. 90-95.

(105) *An Act to Amend the Indian Act*, S.C. 1926-27, c. 32, s. 2; *An Act to Amend the Indian Act*, S.C. 1930, c. 25, s. 16.



Over the history of the *Indian Act*, there have been special "Indian" offences, such as that of an Indian falsely representing himself to be enfranchised.⁽¹⁰⁶⁾ Indians have also been made subject to special penalties. The *Indian Act*, 1876 provided that:

71. Any Indian convicted of any crime punishable by imprisonment in any penitentiary or other place of confinement, shall, during such imprisonment, be excluded from participating in the annuities, interest money, or rents payable to the band of which he or she is a member; and whenever any Indian shall be convicted of any crime punishable by imprisonment in a penitentiary or other place of confinement, the legal costs incurred in procuring such conviction, and in carrying out the various sentences recorded, may be defrayed by the Superintendent-General, and paid out of any annuity or interest coming to such Indian, or to the band, as the case may be.

CONCLUSION

Over the history of federal native administration, both isolationist and assimilationist policies have, with the occasional participation of provincial governments, significantly encroached on the fundamental rights of aboriginal people. The result has been a significant body of laws that have impaired the ability of such people to determine their own future, whether as distinct cultural communities or as individuals outside these.

(106) *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act*, 31st Victoria, Chapter 42, S.C. 1869, c. 6, s. 19.



